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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ELTON R. TINGLE, a single man, Plaintiff/Appellee, v. NEW CENTURY MORTGAGE, Intervenor/Appellant.	2 CA-CV 2008-0072 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20051194

Honorable Javier Chon-Lopez, Judge

AFFIRMED

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Tucson
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Gust Rosenfeld, P.L.C.
By Mark L. Collins and Robert M. Savage
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Attorneys for Appellant New Century Mortgage

H O W A R D, Presiding Judge.

¶1 Appellant New Century Mortgage appeals from the trial court's order denying its motion to intervene after the judgment in the action between appellee Elton Tingle and Melanie Tingle. New Century argues that the trial court abused its discretion in denying the motion to intervene, erred in finding that New Century was not a bona fide creditor, and erred in concluding that Melanie had no property interest to convey to New Century. Because the court did not abuse its discretion in denying New Century's motion to intervene, we affirm.

¶2 The parties do not dispute the relevant facts. In August 2002, Elton purchased a home in Tucson. Although Elton alone paid for the home, he put title in his name and that of his daughter Melanie as joint tenants with right of survivorship. On February 28, 2005, wishing to sever the joint tenancy, Elton filed this action for partition against Melanie. On May 24, 2006, the trial court granted Elton summary judgment, finding that he had not intended to give Melanie an ownership interest in the home and, as a result, that Elton was entitled to sell the property and receive all of the proceeds. The trial court entered final judgment on June 15, 2006.

¶3 Despite the trial court's determination, Melanie and her husband, Vincent DeSantis, executed a deed on August 1, 2006, purporting to convey title to the home from Elton and Melanie to Melanie and DeSantis, as joint tenants.[1] This "deed," however, was not

[1]Melanie and DeSantis actually executed the "Joint Tenancy Acceptance Clause" and did not explicitly sign as grantors. But we treat the deed as the parties have.

signed by Elton, and he had not agreed to the conveyance, although his name was listed as a grantor. Then, on August 14, 2006, Melanie and DeSantis used the property as security to obtain a loan for $105,000 from New Century.

¶4 On December 14, 2006, after learning of the existence of the deed, Elton filed a motion to quash. The trial court granted Elton's motion on February 12, 2007, quashed the deed conveying any interest in the home to Melanie and DeSantis, and quieted title to the property "in the name of Elton Tingle alone." On December 21, 2007—more than ten months after the trial court quieted title in the home—New Century filed a post-judgment motion to intervene pursuant to Rule 24(a), Ariz. R. Civ. P. On March 14, 2008, the superior court denied New Century's motion to intervene, and this appeal followed.

¶5 New Century argues the trial court erroneously concluded that no exceptional circumstances justified its post-judgment intervention, relying on *Salvatierra v. National Indemnity Co.*, 133 Ariz. 16, 648 P.2d 131 (App. 1982), and other cases regarding the timeliness of a motion to intervene. We review a trial court's ruling on the timeliness of a motion to intervene for a clear abuse of discretion. *State ex rel. Napolitano v. Brown & Williamson Tobacco Corp*., 196 Ariz. 382, ¶ 5, 998 P.2d 1055, 1057 (2000). The trial court in its discretion must determine "[w]hether the facts . . . are sufficient to establish a right to intervene." *Weaver v. Synthes, Ltd.*, 162 Ariz. 442, 446, 784 P.2d 268, 272 (App. 1989).

¶6 Rule 24 permits a party to intervene in an action only upon "timely application." The requirement of timely application is "flexible." *Weaver*, 162 Ariz. at 446,

784 P.2d at 272. When determining if a proposed intervention is timely, the trial court must look to "the stage to which the lawsuit has progressed when intervention is sought, . . . whether the applicant could have attempted to intervene earlier" and, most importantly, "whether the delay in moving for intervention will prejudice the existing parties in the case." *Napolitano*, 196 Ariz. 382, ¶ 5, 998 P.2d at 1057; *see also Winner Enters., Ltd. v. Superior Court*, 159 Ariz. 106, 109, 765 P.2d 116, 119 (App. 1988). The granting of a post-judgment motion to intervene is especially likely to prejudice the parties and therefore "is considered timely only in extraordinary and unusual circumstances." *Weaver*, 162 Ariz. at 446, 784 P.2d at 272.

¶7 Here, the trial court found no extraordinary circumstances justifying New Century's post-judgment intervention. The court also found that allowing New Century to intervene would result in "great" prejudice to Elton because he would be forced to re-defend a lawsuit in which he had previously prevailed.

¶8 New Century sought to intervene ten months after the order quashing the deed and eighteen months after the entry of final judgment. The requested disturbance of a long-final judgment and ruling on the motion to quash would clearly prejudice Elton. New Century's claim of an interest in the home is not a sufficiently "extraordinary and unusual circumstance[]" that it requires us to find as a matter of law that New Century should have been allowed to intervene. *Id.* Therefore, the trial court did not abuse its discretion in denying New Century's motion to intervene.

¶9 The cases New Century cites in support of its position do not compel a different conclusion. In *Salvatierra*, because the previous judgment could have implicitly affected the insurance company's rights, the court found that denying intervention would be a "clear[] miscarriage of justice." 133 Ariz. at 20, 648 P.2d at 135. Similarly, in *Kellner v. Lewis*, 130 Ariz. 465, 467, 636 P.2d 1247, 1249 (App. 1981), the court considered the issue in the context of a motion pursuant to Rule 60(c), Ariz. R. Civ. P., stating that "[a]n insurer has standing to move to set aside a judgment which it may be required to pay." In these cases, intervention was permitted when a previously entered judgment affected the intervenor's rights. In *State Farm Mutual Automobile Insurance Co. v. Paynter*, 118 Ariz. 470, 471-72, 577 P.2d 1089, 1090-91 (App. 1978), on the other hand, the court affirmed the denial of a motion to intervene, in part because the insurer there could raise any defenses to the judgment in a separate action the plaintiffs had filed against the insurer. Here, as in *State Farm*, the judgment and the order to quash entered before the motion to intervene did not attempt to affect New Century's rights and would not prevent New Century from pursuing its claims in a separate, future action. Therefore, the cases New Century cites do not compel a different result.

¶10 Although the trial court made findings unfavorable to New Century in denying the motion to intervene, New Century's rights are unaffected by those findings. Elton concedes in his answering brief that the court's ruling containing those unfavorable findings "cannot have collateral estoppel effect" and that the denial of the motion to intervene "does

not preclude [New Century] from litigating the validity of its lien in another forum." We accept this concession. Additionally, we conclude the court's findings on those issues are not necessary to its ruling on New Century's motion to intervene. *See Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 15, 158 P.3d 232, 238 (App. 2007) ("a party asserting that an issue is precluded 'has the burden of proving that an issue was in fact litigated and determined and that determination was necessary [to the decision]'"), *quoting Bayless v. Indus. Comm'n*, 179 Ariz. 434, 439, 880 P.2d 654, 659 (App. 1993) (addition in *Airfreight Express*); *see also Robert Schalkenbach Found. v. Lincoln Found., Inc.,* 208 Ariz. 176, ¶ 18, 91 P.3d 1019, 1024 (App. 2004) (resolution of issue must be essential to decision for issue preclusion to apply). And at one point in the paragraph containing those findings, the trial court specifically stated it was not deciding the issue. *Cf. Airfreight Express*, 215 Ariz. 103, ¶ 15, 158 P.3d at 238. Therefore, even considering the court's findings in denying the motion to intervene, no manifest injustice is present.

¶11 New Century also contends the trial court erroneously concluded that New Century was not a bona fide creditor and that Melanie lacked any interest in the home to convey to New Century. As we have stated above, we agree with Elton that the findings have no preclusive effect on New Century and therefore find it unnecessary to decide these issues.

¶12 Based on the foregoing, we conclude the trial court did not abuse its discretion in denying New Century's motion to intervene. We therefore affirm the court's decision. We deny Elton's request for attorney fees.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge